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No. 85-637

In The
Supreme Court of the United States
October Term, 1985

—o—

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Appellant,

v.

MARY IRVING, ET AL.,
Appellees.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

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QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that 25 U.S.C. §2206, as originally enacted and as amended, violates the Fifth Amendment because it does not provide for compensation to the estates of decedents for the land it declares to escheat.

PARTIES TO THE PROCEEDINGS BELOW

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross.

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the Eighth Circuit Court of Appeals be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Appellees accept those portions of Appellant's Jurisdictional Statement entitled OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED and STATEMENT.

REASONS FOR AFFIRMING THE EIGHTH CIRCUIT COURT OF APPEALS

I. The Decedents Held Vested Property Interests Under the Act of March 2, 1889, Which Included Right to Pass Their Property upon Death.

The Eighth Circuit held that the Appellees' decedents, as successors in interest to the original Indian allottees, had a vested property right to pass their property upon death. (Appt. Jur. St., 16a) This holding is firmly grounded on the circumstances surrounding the allotment of the Great Reservation of the Sioux Nation and sound canons of construction developed by this Court based upon the premise "that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *Handbook of Federal Indian Law*, 221 (1982 ed.).

A. History of Act of March 2, 1889

Appellees have accepted Appellant's statement on the historical background on the allotment of the Great Reservation of the Sioux Nation. However, additional historical material is necessary for the Court to have a complete picture of this allotment process.

The Act of March 2, 1889, ch. 405, 25 Stat. 888, *et seq.*, declared that the Great Reservation of the Sioux Nation,

comprising most of what is now South Dakota, west of the Missouri, would be allotted to individual Sioux Indians (hereafter the Sioux) and all surplus tribal land would be opened to non-Indian settlers. However, the Act also provided that its provisions would be implemented only after acceptance and consent by three-fourths of the male Indian population.[1]

A commission was sent to the Great Reservation of the Sioux Nation to obtain the required approval of the adult male population in 1889.[2] Senate Executive Document No. 51, 51st Cong., 1st Sess. (1890), found in Serial Set 2682,

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1 Act of March 2, 1889, ch. 405, § 28, 25 Stat. 899, provided:

> "That this Act shall take effect, only upon the acceptance thereof and consent thereto by the different bands of Sioux Nation of Indians, in the manner and form prescribed by the twelfth article of the treaty between the United States and Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight[.]"

Article 12 of Treaty of Fort Laramie, April 29, 1868, 15 Stat. 635, required:

> "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article 6 of this treaty."

2 This was the second such commission sent out to meet with the Sioux. The first one sought to obtain approval of the Act of April 30, 1888, ch. 205, 25 Stat. 94 *et seq.*, which also provided for the allotment of the Great Reservation of the Sioux Nation. That commission was unsuccessful in obtaining the required consent of the Sioux.

is the report of this commission. In the appendix at exhibit c are diary entries of the commission which include representations made by the commissioners regarding the ability of the allottees to pass their allotments to their "children" and their "children's children." (Appt. Jur. St., 11a-12a, f.n. 10). Equally important are the several entries which reflect the Sioux's understanding that upon death they could pass their allotments to their families, without the fear that anyone, even the federal government, would take them away.[3] Based on the commissioners' assurances to the Sioux that this understanding was correct,[4] the Sioux accepted and consented to the allotment of their lands and the relinquishment of surplus lands. Only then did the Act of March 2, 1889 become law.[5]

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3 A representative entry expressing the understanding of the Sioux is found in the words of Standing Bear:

> "I want you to take your land in severalty and the Government will have to survey it for you and give you papers for it, so that nobody can take it away from you and when you are dead nobody can take it away from your families." S.Exec.Doc.No. 51, *supra*, at 51 (At the Rosebud Agency, Dakota, June 7, 1889).

4 At the Pine Ridge Agency on June 21, 1889, Bear Nose specifically sought such an assurance from General Crook:

> Bear Nose: "My understanding is with the Commissioners; and when you take this back to the Great Father, and we have agreed to let you have this you have spoken for, and we take our land in severalty, nobody can come up and take our land away from us. That is my understanding."
>
> General Crook:
>
> "That is right."
>
> S.Exec.Doc.No. 51, *supra*, at 111.

5 "The deed submitted herewith is executed and signed by 4,463 being over 3/4s of the adult male Indians occupying or interested in the Great Sioux Reservation; the whole number being 5,678." Letter from Secretary of Interior John W. Noble, January 30, 1890 to President Benjamin Harrison. S.Exec.Doc. 51, *supra* p. 8.

The Appellant argues that the term "heirs" as used in the Act of March 2, 1889, placed restrictions on the ability of the Sioux to pass property upon death. (Jur. St., 23). The Act of March 2, 1889, ch. 405, § 11, 25 Stat. 891, provided that lands allotted to individual Sioux would be held in trust by the federal government for twenty-five years "for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located."

The Indians understood this language to mean that their property interest gained by the allotment process would pass to their families, i.e. when they die a member of their family would then own the land and have the right to pass it on at the time of death. *See supra* f.n. 3 and 4, at 3. The Sioux would not have attached significance to the distinction between "heirs at law" as compared to "heirs testamentary" nor appreciated the word "descent" as a term of art designating intestate succession. The Sioux were unlettered and generally unschooled and surely cannot be held to have understood the specific state laws governing intestate succession or general principles of testamentary disposition.

The testamentary control that the Indians gained by the Act of June 25, 1910, ch. 421, § 2, 36 Stat. 855 (codified as amended at 25 U.S.C.A. § 373 (1983)), was but one aspect of the broader right vested in the original allottee and his successors in interest. Congress by the Act of June 25, 1910 "sought to fill gaps and deficiencies in the administration of estates of allottees." F. Cohen, *supra,* 134 (1982 ed.). The Act of June 25, 1910 did not alter the

vested property interest of the original allottee and his successors to pass property at death, only expanded the ways that an allottee could exercise this right.

It is reasonable to conclude that the ability to will property was a part of the bargain between the Sioux and the federal government. The bargain being that in exchange for the Sioux's release of their common claims to tribal lands, the individual allotted interests obtained by the Act of March 2, 1889 would endure and pass to their children or family members. That the concept of inheritance by devise would eventually be exercised by Indian people is consistent with the grand purpose behind the allotment era to convert Indians to individual property ownership. F. Cohen, *Handbook of Federal Indian Law*, 206-210 (1942).

Finally, the power to devise interests in land is an act of alienation distinct from the ability to pass land to one's heirs. *LaMotte v. United States*, 254 U.S. 570, 579 (1921). The gradual removal of restrictions against alienation was consistent with the federal government's policy of assimilating Indians to white man's culture and enhanced the basic right of passage of interests originally contemplated by the parties.

B. Construction of the Act of March 2, 1889

In construing statutes passed for the benefit of Indian people, this Court developed canons of construction based upon its presumption of Congress' benevolent intent toward its wards, the Indian people. *See generally*, F. Cohen, *supra*, 221-225 (1982 ed.). Three of these canons are applicable to the Act of March 2, 1889. These canons are reflected in the Eighth Circuit's holding that the

original allottees and their successors received a vested right to pass their property upon death.

The first canon of construction, stated most recently in *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267, 2275 (1984), and applicable to construing the Act of March 2, 1889 is:

> that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918).

One of the avowed purposes of the Act of March 2, 1889, was to give the Sioux the benefits of white civilization, specifically individually held property rights. F. Cohen, *supra*, 206-210 (1942). Therefore, when construing the term "his heirs" from Section 11 of that Act, it is violative of this canon to interpret it in a restrictive manner and against the Sioux. It is to the Sioux's benefit to have the term construed allowing their property to pass upon death to their families. Further, it was what the Sioux understood to be the case. *See supra* f.n. 3 and 4, at 3.

A construction of the Act of March 2, 1889 which deprives the Sioux of the right to pass these property interests at death would also violate the canon that:

> a treaty with the Indians [must be construed] as that 'unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules'.

Menominee Tribe of Indians v. United States, 391 U.S. 404, 406, f.n. 2 (1968). This canon is applicable to the allotment of the Sioux since the agreement and consent of three-fourths of the male Sioux was a precondition to the Act of March 2, 1889 taking effect.[6] The understanding of the "unlettered" Sioux was that they would be able to pass their allotments upon death to their families without fear that anyone, including the federal government, would be able to take them away. That understanding should control and not the technical meaning of "heirs" as known in non-Indian property law.

Finally, the Eighth Circuit's construction of the Act is consistent with a third canon: "an appreciation of the circumstances in which the words [of the Act] are used." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). An agreement was reached between the Sioux and the federal government to obtain the consent of the Sioux to the Act of March 2, 1889. The agreement was that for lands allotted in severalty, the Sioux would relinquish title to all communally held lands. That agreement was based in part upon the representations of the commissioners and the understanding of the Sioux people as to their ability to pass individually held property upon death. The Eighth Circuit's appreciation of these circumstances is demonstrated in its holding that allottees and their successors have a vested property right which includes the ability to pass the property upon death.

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6 F. Cohen, *supra*, 224, f.n. 60 (1982 ed.). "That rule would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders and statutes, neither of which directly involved negotiations with the tribes."

E.g. *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Marlin v. Lewallen*, 276 U.S. 58 (1928); *Starr v. Long Jim*, 227 U.S. 613 (1913); and *Choate v. Trapp*, 224 U.S. 665 (1912) where this rule was applied to statutes based upon Indian consent.

C. Vested Rights Arising from Act of March 2, 1889

This Court should affirm the Eighth Circuit's decision which reasoned that the allottees and their successors obtained a bargained for right to pass property upon death. The Eighth Circuit correctly held that the bargain struck between the commission and the Sioux is indistinguishable from the "bargained for right" of a tax exemption in *Choate v. Trappe*, 224 U.S. 665 (1912). *Choate* founded that holding upon the existence of a 1897 contract, the Atoka Agreement between the Dawes Commission and the Choctaws and the Chickasaws, which was embodied in the Curtis Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505, 507. Under the agreement, each tribal member was to receive an allotment which was to be non-taxable for a limited period of time. As consideration for the allotment, each tribal member consented to the allotment of all tribal lands and relinquished his interest in all communally held tribal property. This Court held that the allottees, individual owners of nontaxable land, possessed a vested right to the tax exemption and Congress had no power to remove the exemption without compensation. The existence of the Atoka Agreement, embodied in the Curtis Act, in which the Indians relinquished their common rights in tribal land as consideration for the tax exempted allotments, is repeatedly referred to in *Choate*.

The situation in *Choate* is materially indistinguishable from the situation in the present case. *See supra* pp. 2-4. The Sioux by their consent to allotment and relinquishment of surplus lands gave consideration for the individual allotments each member received. Based upon the reasoning in *Choate*, the original allottees and their successors,

Appellees' decedents, obtained vested rights in their individually held allotments.

The Eighth Circuit, at Appt. Jur. St., 15a, recognized the "bargained for" nature of the vested property rights in *Choate,* "that each allottee had gained a vested right . . . because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property." Then the Eighth Circuit, *supra,* 16a, correctly applied the logic of *Choate* in holding that the Sioux obtained under the Act of March 2, 1889, vested rights including the right to pass property acquired by allotment upon death. *See supra* sections I.A. and B. This holding of the Eighth Circuit should be affirmed by this Court.

II. The Decedents as Individual Indians with Vested Property Interests Were Guaranteed Protection for These Property Interests Under the Fifth Amendment.

The decision by this Court in *Choate* is also important to the case at hand because it defines the protection to be afforded vested property rights held by individual Indians:

> There have been comparatively few cases which discuss the legislative power over private property held by Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent in the same way as other residents or citizens of the United States.

Id. at 677. The Eighth Circuit first correctly found a vested property interest in the original allottees and their successors in interest to pass the lands received by allot-

ment upon death under *Choate*. Then the Eighth Circuit correctly found under *Choate* that these vested property interests were protected by the Fifth Amendment to the Constitution. As a consequence, the Eighth Circuit held the escheat provision of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 98 Stat. 2517 *et seq.*, § 207, 25 U.S.C. § 2206, unconstitutional because it takes Appellees' decedents' property without compensation. (Appt. Jur. St., 16a-17a). This holding is consistent with *Choate* which states that:

> Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than other rights in property. No statute would have been valid which reduced *his fee to a life estate or attempted to take from him ten acres*, or fifty acres, or the timber growing on the land . . . It is conceded that no right which was actually conferred upon the Indian can be arbitrarily abrogated by statute.

Id. at 674. (Emphasis added).[7]

The opinion below rests squarely upon *Choate* which has been consistently adhered to by both lower federal courts and this Court.[8] In short, Indian allottees and their

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7 *Choate* refutes the argument of the Appellant based upon *Andrus v. Allard*, 444 U.S. 51 (1979). *See* Jur. St., 20-21. Appellant argues that the denial of one traditional property right out of a full "bundle" of property rights may not always amount to a taking. However, the "strand" that the escheat provision takes is the right to pass the property upon death. This converts the decedents' property from a fee interest to a life estate in violation of the Fifth Amendment under the explicit language of *Choate*.

8 *E.g. Mott v. United States*, 283 U.S. 747, 752 (1931); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1929); *Morrow v. United States*, 243 F. 854, 856 (8th Cir. 1917); *Bryan County, Oklahoma v. United States*, 123 F.2d 782, 784 (10th Cir. 1941); and *United States v. Nez Perce County*, 95 F.2d 232, 235 (9th Cir. 1938).

successors in interest have judicially established constitutionally protected property rights in individually owned allotments. This has been consistently reiterated and entrenched in the decisions of this Court so much so that no legitimate challenge may now be raised. The Eighth Circuit's opinion below simply reaffirmed this established rule of law. Consequently, the decision of the Eighth Circuit should be affirmed by this Court without further proceedings.

The Appellant fails to appreciate the distinctions between an individual Indian's property and tribal property and the distinctions between personal status and property rights.[9] These distinctions are crucial to this case which is solely concerned with individually held property. Congress' broad powers to re-allocate Indian property are limited by the Fifth Amendment as to property held by an individual Indian. *Gritts v. Fisher*, 224 U.S. 640 (1912) considered during the same term as *Choate* and decided on the same day as *Choate*, held that individual Indians have no rights in tribal property. At the same time, this Court in *Gritts* expressly disclaimed Congress could re-

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[9] *See* Jur. St., 15-16. In *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), it was held that the restraint on alienation was an attribute of the Indian's wardship. Thus, it related to his personal status, not a property right. A conclusion expressly noted by this Court in *Choate*. "Nothing that was said in *Tiger* . . . is opposed to the same conclusion here. For that case did not involve property rights . . ." *Id.* at 678. In *United States v. Kagama*, 118 U.S. 375 (1886), the power of Congress is established to regulate the personal conduct of Indian people by federal criminal prosecutions.

The remaining cases cited by the Appellant deal with tribal land, not individually owned land, and fall under the *Gritts* rule, *infra*.

allocate individual Indian property in recognition of *Choate*.

Choate and *Gritts* established that Congress may not indiscriminately exercise control over reservation lands. Rather, the extent to which Congress may exercise control over such lands depends upon the type of ownership of the land. Congress may re-allocate benefits of tribal land as it sees fit.[10] But as to individual property, such as the property at issue here, Congress may only manage it, subject to the constitutionally protected property rights of individual owners.

Appellees recognize that the plenary powers of Congress authorize it to pass legislation to address the fractionated heirship problem. (*See* Jur. St., 3-7). Such legislation must "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977). But these broad plenary powers are specifically limited to protect the constitutional rights of individual Indians. This Court in *Choate* specifically addressed this issue and found:

> [t]here was no indication that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment.

Id. at 578.

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[10] *E.g. Gritts; United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972); and *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

Therefore, Congressional attempts to address the fractionated heirship problem must, at a minimum, provide for compensation to be paid for the property taken from individual Indians. The Eighth Circuit correctly struck down Section 207 of the Indian Land Consolidation Act, as originally enacted and as amended, because "by its plain terms . . . [it] does not provide for compensation to the estates of decedents for land it declares to escheat." (Appt. Jur. St., 17a).

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CONCLUSION

The Appellees respectfully move that the Eighth Circuit decision be affirmed.

Choate and the Eighth Circuit's decision parallel each other in many respects: both involve individual Indian property rights; both involve "bargained for" property rights in trust allotments; both affirm the existence and protection of such rights; both reject attempts to divest such rights by a later federal statute; and both limit the federal government's powers as a guardian of the Indians' private property. In the face of these parallels, *Choate* clearly controls the disposition of this case and an affirmance of the Eighth Circuit's decision is required.

Respectfully submitted,

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